

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES

State of Alaska

DIVISION OF MINING, LAND AND WATER

TO: Randy Bates
DGC

DATE: 2/28/2001

TELEPHONE NO: (907) 465-3404

FAX: (907) 586-2954

EMAIL: janetb@dnr.state.ak.us

FROM: Janet Burleson Baxter
DNR ACMP Coordinator

SUBJECT: Draft 6 AAC 50
Comments

Thank you for the opportunity to review the December 3, 2000 Draft 6 AAC 50 Consistency Review Regulations. This is the first public review draft of the regulations, but DGC and the ACMP Working Group have labored for many months to address consistency concerns. This is a well thought out draft. It addresses many of DNR's concerns. DGC has gone the extra mile to accommodate schedules of agency and public reviewers. I'm sure the extra consideration facilitated more thoughtful comments from all reviewers. I thank you and commend you, Kerry and Lisa in particular for your attention to varying concerns and comments along the way. You have addressed agency concerns professionally while maintaining a good sense of humor.

Staff from several DNR divisions provided comments on the draft regulations. I have consolidated these comments for your consideration.

I recognize that DGC will most likely receive numerous comments from the various reviewers of the draft regs. I encourage you to provide a second draft for public review. I look forward to working with you to resolve probable conflicting comments and revising the draft regulations accordingly.

General Comments.

The draft regulations envision a significant departure from the existing consistency review regulations. The current regulations were adopted amidst a strong commitment to applicants for comprehensive assistance and timely review of proposed projects. The draft regulations do not capture this concept.

When the 6 AAC 50 regulations are adopted the CPQ will need to be amended immediately, better yet simultaneously and the ABC List will require immediate revision.

The Guidance Document that was distributed in late 1999 attempted to recognize and address some of the tension that is inherent in a networked program including agency workload and agency stipulations that were subject to different interpretation. The draft regulations capture

some of the provisions in the Guidance Document particularly in Article 2. I believe the recognition of constraints in the Guidance Document contributed to the flexibility that is built into the draft regulations.

For example, the term “will likely” is used throughout the regulations. This term provides flexibility for resource agencies and the coordinating agency (CA). However, the term is undefined and does not provide direct, concrete directions for consistency reviews. DNR recognizes that prescriptive, specific language can subject the CA to procedural exposure and that prescriptive language does not recognize agency constraints. The draft regulations attempt to walk a fine line between the procedural exposure and prescriptive language. This trade off is a decision that the policy makers need to address.

The word “may” is used extensively throughout this proposed revision. Again, the language gives the coordinating agency flexibility when conducting a consistency review, but it does not provide consistent, clear direction to the agencies. Though a means for review is provided under 6 AAC 50.035(f), uniform application between resource agencies conducting single agency reviews is not assured. In some instances no concrete guidance, standards, or criteria are provided for making a determination. Examples of this are a passive description of what activities are subject to the review process, no clear requirements for what must be provided in a project description for it to be accepted, and indefinite methods for computation of time.

The proposed regulations do propose solutions to some long-standing problems. They clarify that agencies may coordinate the processing of all agency authorizations along with the consistency review. However, it comes at the price of indeterminate delays in initiating the consistency review and it institutionalizes problems associated with agency backlogs in processing applications due to personnel and other resource constraints.

Specific Comments:

For the most part these comments are arranged to note DNR’s specific issue or concern followed by a proposed revision to the draft regs. The revisions are shown in standard edit format where appropriate.

6 AAC 50.005. APPLICABILITY OF THE ACMP CONSISTENCY REVIEW PROCESS.

6 AAC 50.005 (a). This subsection provides a very broad application of the ACMP that appears to exceed the federal requirement for state management programs. At 15 CFR 923.3(b) the federal regs provide that states’ coastal programs “must provide for the management of those land and water uses having a direct and significant impact on coastal waters and”. At 15 CFR 930.33 the federal regs address federal agency activities that affect any coastal use or resource. At 930.33(b) the federal agencies are required to look “at reasonably foreseeable direct and indirect effects on any coastal use or resource”. This subsection as written distorts the intent of the federal regs.

I recommend the following language:

6 AAC 50.005 (a) An [PROJECT] activity that may have direct and significant impacts [AFFECT ANY] on a coastal use or resource is subject to the consistency review process described in this chapter when [ANY] an activity that is part of the project

(1) requires a resource agency authorization;...

6 AAC 50.025. SCOPE OF PROJECT SUBJECT TO CONSISTENCY REVIEW.

6 AAC 50.025(a) The coordinating agency should set out its version of the scope of the project when it initiates the review; if the review participants believe it is too narrow or broad, they can comment to that effect. The consultation requirement presents an added workload for the coordinating agency. Amend this subsection as follows:

6 AAC 50.025. (a) The coordinating agency[, IN CONSULTATION WITH ANY RESOURCE AGENCY THAT REQUIRES AN AUTHORIZATION], shall determine the scope of the project subject to a consistency review. Review participants may comment on the scope of the project.

6 AAC 50.025(b)(3). Delete. This provision greatly expands the current interpretation of the scope of project for resource agency authorizations. The wording of this regulation, along with the definitions for “activity” and “project” in 6 AAC 50.990, could mean that all activities associated with the project will be subject to the consistency review regardless of their impacts to coastal resources. This broad interpretation exceeds the vision of the coastal program, which is to analyze and diminish impacts to coastal resources and uses. The language in this provision does not even link to coastal impacts, it only provides that “the project as proposed, could not be conducted”

6 AAC 50.035. DIVISION OF GOVERNMENTAL COORDINATION (DGC) RESPONSIBILITY.

6 AAC 50.035(f): The provision that DGC could review consistency determinations of a resource agency at any time was entirely appropriate when the current regulations were adopted. Now that resource agencies have many years of experience conducting reviews the provision is redundant. I am also unclear on the exact federal requirement for this review. Therefore I recommend that this provision be deleted.

6 AAC 50.055. COASTAL RESOURCE DISTRICT RESPONSIBILITY

The coastal districts’ participation in the ACMP and consistency reviews is an integral part of the ACMP and the federal law clearly envisions that local governments should have a large role in coastal projects within their boundaries. To simply state that a district ‘may’ participate is a huge delegation of the responsibility for implementation of a district plan. DNR would like to see more districts engage actively in the consistency review process and provide comments, particularly on the district enforceable policies. We recommend the following revision.

6 AAC 50.055(a) Coastal Resource District Responsibility. “a coastal resource district [MAY] shall participate in a consistency review by submitting comments to the coordinating agency.

6 AAC 50.055(b)(2) This provision allows a coastal district to include an alternative measure on a local authorization under AS 29. Clarify that even though the alternative measure may appear on a local permit the district does not have due deference in interpreting the alternative measure.

6 AAC 50.205. CONSISTENCY REVIEW COORDINATION. 6 AAC 50.205(c). DNR supports this concept.

6 AAC 50.210. COASTAL PROJECT QUESTIONNAIRE.

AAC 50.210. Coastal Project Questionnaire. an activity that [IS LIKELY TO] affects a coastal use or resource. *See comments on 6 AAC 50.005*

We need to build in a CPQ exemption for “direct state actions”. The goal of the CPQ is to

determine which authorizations are needed for a project and to provide an adequate description of the project and its location. Completing a CPQ does not assist in the review when the information that the CPQ tries to solicit is adequately described in the review packet.

6 AAC 50.210(c) ...(4) for a state agency action when the proposal includes an adequate legal description for the consistency review .

6 AAC 50.216. PRE-REVIEW ASSISTANCE

6 AAC 50.216 (d)(2) This subparagraph provides that a resource agency that requires an authorization “may”...provide the applicant a preliminary assessment regarding whether the activity will comply with its statutory and regulatory authorities”. Resource agencies are able to identify known limitations up front such as whether a project lies in a special use area or there is a restriction in an area plan. However, agencies are not able to predispose the outcome of a project with limited information. Amend as follows.

6 AAC 50.216(d)(2) a resource agency that requires an authorization for an activity that is part of the proposed project may identify issues related to the authorization and potential mitigation requirements, and, to the extent [PERMITTED BY LAW] feasible, discuss with the applicant [PROVIDE THE A PRELIMINARY ASSESSMENT REGARDING WHETHER] how the activity [WILL] may comply with its statutory and regulatory authorities.

6 AAC 50.220. APPLICANT CONSISTENCY REVIEW PACKET

6 AAC 50.220(e). An applicant shall submit directly to the agency responsible for issuing an authorization, an application for a state authorization requiring information that must be held in confidence by law, and any fee associated with a state authorization. The agency shall defer to the statutory requirements under their respective statutes concerning the appropriate handling of the confidential information for consistency review purposes. [THE AGENCY SHALL DELETE THE CONFIDENTIAL INFORMATION FROM ANY COPY OF THE APPLICATION THAT IS DISTRIBUTED FOR CONSISTENCY REVIEW UNDER THIS CHAPTER.]

6 AAC 50.225. DETERMINATION OF COMPLETENESS AND NOTICE TO APPLICANT.

6 AAC 50.225 (b)(2) an authorizing resource agency determines an authorization application is sufficient to begin a review under its [MEETS THEIR] statutory and regulatory requirements [FOR COMPLETENESS]; and

6 AAC 50.225 (c) This provision requires that the coordinating agency notify the applicant if the packet is incomplete. If “day 1” of the project is delayed to accommodate agency review schedules the coordinating agency should also advise the applicant that the packet is complete, but “day 1” is delayed due to agency schedules.

6 AAC 50.235. TIMING OF A CONSISTENCY REVIEW

6 AAC 50.235(b). In draft 6 AAC 50.990(33) the definition of minimal impact means negligible impact. If the draft definition is retained then all activities that have “minimal impact” should be moved to the A or B List. The proposed definition, based on negligible impacts, renders a consistency review unnecessary.

6 AAC 50.235 (c) and (d). Delete these subsections. These provisions allow the coordinating agency to convert a 30 day review into a 50 day review with consultation. It is not clear how this provision impacts authorizations that are listed as 30 day reviews on the “C” list as the C

List is envisioned in draft 6 AAC 50.750. Specific provisions are given for a coordinating agency to grant extensions for a review in 6 AAC 50.280. This section is unnecessary.

If DGC decides to retain subsections (c) and (d) then change the date for the request to convert a review to 50 days to match the date to request additional information:

d) A request to convert a 30-day review to a 50-day review must be received by the coordinating agency on or before Day ~~[+0]~~ 13 of the 30-day review. The coordinating agency shall notify the applicant and review participants as soon as practicable if the review schedule is changed

6 AAC 50.240. INITIATION OF A CONSISTENCY REVIEW.

6 AAC 50 240(d)(2) This provision exists in the current regulations, but it should be amended. Currently there is no prescribed method to identify persons who may be interested in a project. This is an exposure for the CA if they have no way to identify interested persons. Revise as follows.

6 AAC 50 240 (d) (2) furnish a copy of the consistency review packet to a person who has requested it [INTERESTED IN THE PROJECT];

Revise the language in .240(3) to more closely match DNR's notice requirements and therefore simplify combined public notices.

AAC 50 240(3) make a copy of the consistency review [PACKET] notice available for public inspection and copying at a public place.

6 AAC 50.245. REQUEST FOR ADDITIONAL INFORMATION

6 AAC 50.245 (a). In Section IV. H. Requests for Additional Information (RFAI) and Other Clock Stops, Guidance to Staff 1, the Guidance Document provides: When the coordinating agency receives a request for additional information on either a topic outside the requestor's expertise or on a topic for which expertise is shared by the requestor and another agency, the coordinating agency will consult with all review participants with expertise to determine whether the requested information is necessary to evaluate the proposed activity's consistency with the ACMP.

This Guidance Document provision needs to be captured in the draft regulations. The Guidance Document language provides a tool for the coordinating agency to decide when a RFAI is warranted for the project and when the request may be frivolous. In fact, RFAIs should be extremely infrequent and the coordinating agency should only accept them if the information is necessary to determine whether the project is consistent with the ACMP.

6 AAC 50.255. REVIEW PARTICIPANT COMMENT.

The Guidance Document, Section IV. I. Solicitation and submission of comments Guidance to Staff 1 provides that: Each resource agency shall submit comments to the coordinating agency that briefly explain why the agency believes a project is consistent or inconsistent with the applicable coastal program standards and policies within the agency's area of expertise...

I recognize that the issue of workload was discussed in the context of this provision in

the Guidance Document. However, DNR staff remains deeply concerned about additional workload. Generally, 6 AAC 50.255(a)(2), 260(g) (1)-(4), 375(d) present additional workload for resource agency staff. DNR would like to explore the possibility of a presumption of consistency, with analysis required only when an agency believes the project is not consistent.

This section requires that resource agencies separate comments into conditions vs. alternative measures. Conditions are stipulations that an agency attaches pursuant to its respective statutory and regulatory authority but that could be interpreted as a stipulation attached for consistency—a so called hybrid stipulation. Alternative measures are stipulations required solely for consistency. Under the draft regulations conditions are not subject to elevation under 6 AAC 50. Alternative measures are subject to elevation.

Conditions that are provided by resource agencies to address their respective statutory and regulatory responsibilities may differ. It is not clear how the coordinating agency will address these potential differences. From DNR's experience it is more difficult to make this distinction than it appears. It is important for agencies to be assured that the conditions they provide are not changed. The coordinating agency may interpret a condition that is provided by DNR to be one of the "hybrid" stipulations that the CA perceives are necessary for consistency. The CA's may therefore amend the hybrid stipulation that DNR provided. It is important to note that the condition provided by the agency under its own authority will appear on the agency's respective authorization just as the conditions were provided to the CA, not as they may be amended on the proposed consistency.

At this juncture, my recommendation is to drop this provision. If DGC drops the requirement to provide stipulations and alternative measures conforming changes will be necessary throughout the draft regulations.

The following proposed amendment falls into the same category as my general comment on procedural exposure. A policy call will be necessary on this proposed revision. If the provision to separate stipulations into conditions or alternative measures is retained, DNR proposes the following language.

6 AAC 50.255(a) A resource agency that is issuing an authorization for a project must comment during the comment period. A comment submitted by a review participant shall...

6 AAC 50.255(a)(3) [DESCRIBE] identify any alternative measure necessary to ensure the project is consistent with the ACMP; and

6 AAC 50.260. DEVELOPMENT OF A PROPOSED CONSISTENCY DETERMINATION.

6 AAC 50.260 (c) needs to be changed to prevent the coordinating agency from incorrectly determining there is consensus and issuing a proposed determination. Sometimes DGC assigns permit stipulations to a DNR authorization without prior discussion with DNR. Without prior discussion DGC has not determined if there is a consensus. Elevations between agencies are something to be avoided. The result is a defacto conclusive determination without consensus building.

6 AAC 50.260(c) Based on the comments received, the coordinating agency shall

determine whether there is consensus among the review participants regarding a project's consistency with the ACMP and any alternative measures necessary to ensure a project is consistent. The coordinating agency will consult with an agency as to the alternative measures being considered for implementation through that agency's authorization prior to determining if there is consensus among the review participants.

6 AAC 50.260 (d) When the comments indicate there is not consensus, the coordinating agency shall facilitate a discussion among the review participants to attempt to reach a consensus. When participants cannot reach consensus, the coordinating agency shall develop a proposed consistency determination that considers the comments and positions of the resource agencies and affected coastal resource districts. If a proposed consistency determination contains errors, or includes alternative measures on which there is no consensus, a revised proposed consistency determination may be issued at the sole discretion of the coordinating agency

6 AAC 50.260 (d) should be modified to recognize the occasional need for revised proposed determination.

6 AAC 50.260 (g) (1). DNR feels that coastal districts should participate significantly in the review process. The district should provide an evaluation against their district policies.

6 AAC 50.275. RESOURCE AGENCY PROJECT AUTHORIZATION

These regulations assign implementation responsibility to the agencies in their area of expertise (which authorization will contain which stipulations). Since the coastal district is the designated expert (6 AAC 50.055(b)(1)) for interpreting their plan it is appropriate that they carry those permit stipulations. That is consistent with the law (AS 46.40.090(b)) that requires the coastal districts that exercise zoning or other controls to implement their coastal program. State agencies would still implement the coastal district program when the coastal district does not exercise land use controls (AS 46.40.090(a)). This would be accomplished by the shown amendment to the new regs in 6 AAC 50.275 (b).

6 AAC 50.275(b) An alternative measure developed during a consistency review that is within a resource agency's area of expertise or administrative responsibility shall be implemented through the agency authorization for the project. An alternative measure not clearly under any agency's expertise shall be implemented through all resource agency authorizations required for a project. . An alternative measure that is required for consistency with a coastal district plan shall be implemented through a local government authorization for the project, if a local government authorization is issued. An alternative measure implemented through a local government authorization need not be implemented through a resource agency authorization to assure a project is consistent with the ACMP.

6 AAC 50.275 (i) "Following receipt or issuance of a final positive consistency determination, DNR...."

There should be a section on enforcement so that everyone knows upfront the way the stipulations will be enforced. This change reflects my understanding of enforcement and would be accomplished by the amendment to the new regs at **6 AAC 50.275 (k)**. If my understanding is

not correct, it is all the more reason to have a section on enforcement.

(k) An alternative measure implemented through the authorization of a resource agency may be enforced by that resource agency according to that agency's priorities, available resources, and preferred methods.

Add AS 46.40.090 to the list of statutes at the end of this section.

6 AAC 50.280. CONSISTENCY REVIEW SCHEDULE MODIFICATION AND TERMINATION

DNR "disposes" of water, material, timber and minerals as well as land. The language needs to be revised as proposed to recognize these other types of disposals. The proposed revision comports with the definition in 6 AAC 50.990(23). Recognizing other types of disposals in this manner also provides a segue to the provisions of AS 27.05.010(b) which assigns DNR as the lead agency for mining activities.

6 AAC 50.280 (a) The coordinating agency may modify the consistency review schedule under the following circumstances and for the time specified:

(1) The coordinating agency and resource agency may agree to modify the review schedule as necessary to coordinate the consistency review with the agency's statutory or regulatory authorization review process, including a DNR disposal of state's interest [IN STATE LAND], provided the length of time for receipt of comments is at least as long as under 6 AAC 50.250;

6 AAC 50.280 (a)(3). Consistency Review Schedule Modification and Termination. Add some time certainty to this provision for a public hearing. As proposed this regulation could subject a consistency review to indeterminable delay. It is reasonable to expect a public hearing to be completed within a reasonable time frame such as those established for elevations or petitions under 6 AAC 50.280 (a)(10) & (a)(11).

6 AAC 50.325. FEDERAL CONSISTENCY DETERMINATION. DNR devotes a significant amount of time trying to evaluate federal activities for consistency. To the greatest extent possible incorporate the provisions of 6 AC 50.425(c) into this subsection.

6 AAC 50.390 (2). Resource Agency Authorizations. The cross reference should be 6 AAC 50.275(b). (See associated comments for that sub-section.)

6 AAC 50.500. PUBLIC NOTICE.

The proposed changes facilitate the joint notice of DNR approvals with DGC public notices. We should be able to achieve efficiencies and provide better service to the public by having a single point of contact and the various authorizations identified in a single notice.

6 AAC 50.500 (c) A coordinating agency may issue a joint public notice of a consistency review [MAY BE ISSUED] with other state or federal agencies if that notice complies with the minimum requirements identified in this section. At the request of an agency the coordinating agency will include reference to that agency's authorization in the public notice, solicit comments on behalf of that agency, and forward comments to the requesting agency as appropriate.

6 AAC 50.520. PUBLIC HEARINGS.

The potential exists for indeterminable delay of the consistency review for public hearings held

by coastal resource districts. It is reasonable to require that any public hearings be held within a reasonable time frame such as those established for elevations and petitions under 6 AAC 50.280 (a)(10) & (a)(11).

Add a provision to assist resource agencies when a hearing is requested under 6 AAC 50.520. When a single agency review becomes controversial, for example a marine seismic permit in Cook Inlet, DNR needs support from the professionals at DGC. Under DNR's authority we are able to public process issues by holding a public meeting. Under 6 AAC 50 requirements the department is subject to a formal hearing process.

Add the following provision, perhaps as a new subsection (f). 6 AAC 50.520(f) DGC will, at the request of a resource agency coordinating a review, fulfill the role of the coordinating agency with respect to implementation of these public hearing requirements.

6 AAC 50.520(a)(2) The word concern does not reflect the substance of the review. Please revise as follows.

6 AAC 50.520(a)(2) ... finds that the request is based on [CONCERNS] facts or information regarding the project's consistency with an enforceable policy that would not otherwise be considered in the consistency review.

6 AAC 50.610. ELEVATION PROCESS

It is not clear in the draft regulations that the coordinating agency must invite the applicant. Revise accordingly.

6 AAC 50.610(e). Elevation Process. (e) The coordinating agency shall invite the applicant and may invite another affected party to participate in the meeting arranged under (d) of this section.

6 AAC 50.700 Use of General and Nationwide Permits.

6 AAC 50.700 (a) This provision has been a point of confusion during public hearings on the draft regs, especially how it relates to Nationwide Permits. Add language to clarify that activities included in a project that are not addressed under a General Permit or Nationwide Permit are still subject to a consistency review.

6 AAC 50.750. ACTIVITIES GENERALLY SUBJECT TO INDIVIDUAL CONSISTENCY REVIEW (d). DNR supports this concept.

6 AAC 50.780. GENERAL CONSISTENCY DETERMINATIONS FOR FEDERAL ACTIVITIES

6 AAC 50.780(d) Delete this provision. It is redundant. If the project is "substantially" different than originally described then it is not subject to the general consistency.

Article 8. Modifications – General concerns. For minor modifications, the authorizing agency should be able to determine, without further processing, whether there are additional impacts. Perhaps there could be a checklist so that this could be determined quickly and certified by the agency, without completion of additional CPQs and circulation to review participants. Please note that revisions to plans may occur frequently during an authorization process, for example, a slight change in a right-of-way route.

DNR has been very concerned about renewals to long-term existing facilities that may not have been subject to a consistency review. We believe the draft regulations ad-

equately address renewals and modifications to existing facilities that were subject to a previous consistency review and facilities that were authorized prior to the ACMP. DNR strongly supports the language in draft regulations.

6 AAC 50.810. PROJECT MODIFICATIONS AFTER ISSUANCE OF A FINAL CONSISTENCY DETERMINATIONS.

Revise 6 AAC 50.810(b)(1) to allow the issuance of an A or B list or General Permits without additional consistency review. There is no reason to delay an applicant if the project complies with the ACMP under the A or B List.

6 AAC 50.810 (b) (1) a new resource agency authorization that requires an individual project review under 6 AAC 50.750 or a new federal authorization is required; or.

6 AAC 50.810(b)(2) is too comprehensive. There may be many changes to a DNR authorization that do not have anything to do with ACMP. If it will likely cause additional impacts, and requires a new C list permit or modifications to the alternative measures, then review. The same comment applies to (e) (3) and (4) and (f).

6 AAC 50.810(b)(2) a change to the alternative measures of an existing resource agency or federal authorization is required.

6 AAC 50.810(b)(3) when a change to the alternative measures on an existing authorization from two or more resource agencies is required;

It is very important to retain the “and” that joins 6 AAC 50.810(f)(1)and (2).

AAC 50.810(f) The coordinating agency shall distribute the CPQ for the proposed modification to the review participants. Each review participant [SHAWL] shall respond to the coordinating agency within 5 days after the CPQ is distributed and [IDENTIFY] determine whether

(1) a new authorization [OR A CHANGE TO AN EXISTING AUTHORIZATION] is required; and
(2) if the proposed modification may cause additional impacts to coastal uses or resources and requires modification of alternative measures

6 AAC 50.810 add a new subsection between (h) and (i): Resource agencies need more flexibility here. Works in progress should not be delayed for a consistency review unless there are significant additional impacts to coastal uses and resources and there is a significant public benefit to additional review. In many projects there are unforeseen circumstances that need prompt resolution. Agencies need the flexibility to be responsive and sensitive to real world conditions and practical considerations.

Proposed new subsection: If physical conduct of the permitted activities is underway and the coordinating agency decides the time required for a 30 or 50 day review is not feasible or prudent, the coordinating agency may, with the agreement of the review participants and the applicant, modify the times required for the review process.

6 AAC 50.810(i) The following modifications, that have no additional effect on coastal uses and resources, are not subject to further consistency review:

6 AAC 50.820. AUTHORIZATION RENEWALS OR REISSUANCE.

6 AAC 50.820 (a) When an authorization for a project is subject to renewal or reissuance, or the authorization has expired and no modification to the project is proposed, no further action under this chapter is necessary.

6 AAC 50.810 only requires that the part of the project affected by the proposed modification be subject to a consistency review. Deleting the words “renewal and” reduces confusion.

6 AAC 50.810 b) When an authorization for a project is subject to renewal or reissuance and a modification to the existing project is also proposed, the [RENEWAL AND] proposed modification shall be subject to the provisions of 6 AAC 50.810.

Note: Some DNR permits must expire before they can be renewed. Also, even if an agency’s authorization expires, the consistency does not. Therefore, a project that was found consistent remains consistent unless it is modified. Delete .830.

[6 AAC 50.830. AUTHORIZATION EXPIRATION. WHEN AN AUTHORIZATION HAS EXPIRED AND A NEW AUTHORIZATION IS SOUGHT, THE ACTIVITY SUBJECT TO THE NEW AUTHORIZATION SHALL BE CONSIDERED A NEW ACTIVITY SUBJECT TO A CONSISTENCY REVIEW.]

6 AAC 50.910. OPTIONAL PRELIMINARY CONSISTENCY DETERMINATION. 6 AAC 50.910. [OPTIONAL] Alternative Preliminary Consistency Determination. Clarify that this Section is an alternative to the 30 or 50 day review schedule.

This Section provides an opportunity for the coordinating agency to distribute a draft proposed consistency finding, similar to a finding that DNR provides under AS 38.05.035. It also recognizes that not all projects are created equal. However, it needs clarification. The regulation gives no real direction or criteria for when this regulation should be used or how it affects the timing of the review, or how it should be implemented. The definition of “minimal” contained in 6 AAC 50.990(33) means that most DNR individual reviews would comply with the provisions in this Section.

6 AAC 50.990 Definitions.

6 AAC 50.990 (2). This is a new, very broad definition for the ACMP. In conjunction with the 6 AAC 50.025 it significantly increases the influence of the ACMP. Minimally, revise as follows.

(2) “activity” means a land or water use that [MAY] affects [ANY] coastal uses or resources, including construction, reconstruction, or demolition of any structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; discharge of air pollutants; aquatic farming; timber harvest operations; log transfer facilities; oil and gas exploration and development; and oil spill contingency planning;

Delete 6 AAC 50.990(7)(B) per our comments on 6 AAC 50.025(b)(3).

(7) “associated facility” means any development

(A) that is specifically designed, located, constructed, operated, adapted or other-

wise used, in full or major part, to meet the needs of a federal activity or a federal or resource agency regulatory action; and

[(B) WITHOUT WHICH, THE FEDERAL ACTIVITY OR A REGULATED ACTIVITY, AS PROPOSED, COULD NOT BE CONDUCTED;]

6 AAC 50.990 (11). This definition is definitely written in bureaucratize. Clarify by rewording the definition so that the examples of uses and resources are organized separately.

6 AAC 50.990 (33). This definition simply substitutes the existing standard “minimal” (meaning consisting of or representing the lowest amount or degree allowable or attainable, *Webster*) with a more restrictive one. Thus the proposed definition basically redefines “minimal impact” as “imperceptible impact” and effectively negates any need for use of the term in the regulations since there is virtually no situation that could comply with this unreasonably stringent regulation. This definition cannot be reconciled with the concepts on which the regulations in ARTICLE 7 are based nor does it appear to be compatible with the federal requirement for states to recognize competing uses of the coast. It also is not compatible with the requirement that uses of state concern not be arbitrarily or unreasonably restricted. Either delete the definition or revise as follows:

(33) “Minimal impact” means [A NEGLIGIBLE] the smallest possible or attainable disturbance to coastal uses or resources;

6 AAC 50.990 (a)(36) Amend the definition of project to comport with proposed revisions to 6 AAC 50.026.

[36] “project” means all activities that will be part of a proposed coastal development, [INCLUDING ASSOCIATED FACILITIES,] that are subject to the consistency review requirements under this chapter

Please contact me if you have any questions. Again, I commend you, Kerry and Lisa in particular for your work on the draft regs. I look forward to the next draft.

cc: Marty Rutherford
Bob Loeffler
Mary Kaye Hession
Bill Britt
Tony Braden
Johanna Munson
Matt Rader
Steve Schmitz
Roselynn Ressa Smith
Karlee Gaskill
Doug Sanvik
Pam Rogers
Bruce Johnson
Marty Welbourn Freeman